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SUBJECT: ARGENTINA'S ECONOMIC CRISIS LEGACY: FIRST IN ICSID
ARBITRATION CASES

Classified By: Econ Counsleor D.P. Climan. Reasons 1.4 (B,D)

Introduction and Summary

¶11. (SBU) Now, five years after Argentina's December 2001 economic implosion and the largest sovereign default in world history, considerable attention remains focused on over \$20 billion in outstanding claims by holders of defaulted Argentine bonds. Less well appreciated is the over \$13 billion in outstanding arbitral claims against the GoA by foreign investors, the value of whose Argentine assets were dramatically reduced by unilateral emergency measures adopted by the GoA in the aftermath of the crisis. As a consequence, Argentina today holds the unfortunate distinction of having the largest number of outstanding arbitration cases pending at the World Bank's International Center for the Settlement of Investment Disputes (ICSID). Following is the first in a series of 3 cables that (1) review pending ICSID claims against Argentina and the financial burden their resolution threatens to impose on the GoA; (2) detail individual cases filed by U.S. investors; and (3) evaluate the GoA's strategy to minimize its ICSID contingent liabilities while continuing to attract new foreign direct investment.

¶12. (C) There are currently 33 pending ICSID cases against the GoA, fully one third of all outstanding ICSID cases. Thirty of the 33 cases were filed following the December 2001 collapse of Argentina's currency board and subsequent economic crisis. Most of these were filed under the provisions of the U.S., French and Spanish Bilateral Investment Treaties (BITs). Outstanding ICSID claims against Argentina total roughly \$13.3 billion, with a large proportion concentrated in the energy sector. This claim total represents roughly 6.5% of projected 2006 GDP and almost twice the projected 2006 primary fiscal surplus.

While contingent liabilities resulting from international arbitral awards on ICSID claims could add substantially to government debt in coming years, the suspension of a number of ICSID cases by plaintiffs as a result of negotiations with the GoA along with ICSID final rulings on a few cases that awarded judgements smaller than original claims could reduce this \$13.3 billion liability number substantially. In any case, Argentina's regrettable ICSID track record will increase the risk premium existing and new foreign investors will demand to commit new capital to Argentine ventures. END SUMMARY

Arbitral Legacy: Privatizations, BITs

¶3. (U) During the 1990s, the administration of then President Carlos Menem undertook the wholesale privatization of Argentina's public utilities and services sector as part of a series of Washington-consensus-style economic reforms. Privatized sectors included energy (upstream and downstream hydrocarbons, electricity generation, transmission and distribution, natural gas transmission and distribution), telecommunications (landline and cellular systems), transport infrastructure (toll roads, ports and airports), water/sewage services and postal services. With the bulk of these privatizations financed by foreign direct investment, the GoA signed a total of 57 bilateral investment treaties (BITs) which included provisions re-stating Argentine constitutional and commercial code provisions guaranteeing foreign investors national treatment, the right to repatriate dividends and the right to compensation for expropriation. To offer foreign investors further comfort, most BITs also included provisions for international arbitration as a dispute settlement

mechanism between private investors and the GoA. Most of these BIT arbitration provisions cite the World Bank's ICSID, while a few cite alternate arbitral forums, most prominently UNCITRAL (United Nations Commission on International Trade Law). Argentina signed the ICSID Convention in May 1991 and it entered into force in 1994 following parliamentary ratification.

Breakdown of Outstanding ICSID Cases/Claims

¶4. (SBU) There are currently 33 pending ICSID cases against the GoA, roughly one third of all outstanding ICSID cases. Of these, the bulk were filed under the U.S. BIT (14 cases), the French BIT (8 cases) and the Spanish BIT (5 cases). Numerous cases were issued under multiple BITs. Thirty of the 33 cases were filed following as a result of disputes resulting from the December 2001 collapse of Argentina's currency board and subsequent economic crisis. Of the 33 active ICSID cases, 18 are concentrated in the energy sector (upstream hydrocarbon development, electricity generation and distribution and natural gas transportation and distribution) with known claims for USD 7.1 billion; 2 in telecommunications with known claims for USD 2.9 USD billion; 6 in waterworks with known claims for USD 2.6 billion.

¶5. (SBU) Outstanding ICSID claims against Argentina total roughly \$ 13.3 billion, 6.5% of 2006 GDP, almost twice the estimated 2006 primary fiscal surplus. (Note: This total excludes an estimated \$5.5 billion claim by Task Force Argentina representing 170,000 Italian holders of defaulted GoA bonds: It is widely held that bond-holdings do not qualify as investments protected by the bilateral treaties overseen by ICSID. End Note). Seven of these 33 ICSID cases have been officially suspended (but not withdrawn) as a consequence of negotiations between individual companies and the GoA; the \$ 13.3 billion claim total drops by almost half to \$ 7.9 billion if claims of suspended cases are subtracted.

In addition, the first two final rulings on post-crisis ICSID cases (septel) have awarded judgements smaller than

original claims. In any case, contingent liabilities resulting from international arbitral awards on ICSID claims could add substantially to government debt in the coming years. (Note: Information about cases filed before ICSID is not public and ICSID bodies requires only minimal disclosure of the parties, names and a brief indication of the subject matter, which makes such disputes difficult to track.

Figures included in this cable are the result of Embassy's own analysis and data collection from U.S. company contacts, the ICSID website, legal journals and the media. ICSID claim totals do not include claims for 6 of the 33 cases because they are unknown to Embassy or yet to be determined. Neither are UNCITRAL claims included in this total. End Note).

ICSID Case Claimants by Nationality and BIT

¶6. (SBU) Firms involved in pending cases against Argentina before ICSID tribunals come from the US, Chile, Italy, Germany, France, Spain and the UK. However, the legal addresses of affiliates and subsidiaries which are the legal entities filing the suits are not always located in firms, countries of origin and, as a consequence, the BITs on which these companies base their ICSID claims do not always coincide with the investor's country of origin. (Note: This has offered some interesting advocacy challenges for Embassy Buenos Aires on which we have solicited guidance from the Department of Commerce's Washington Advocacy Center. End Note). Outstanding ICSID cases have been based on BITs

negotiated between Argentina and the US (signed 1991, Law 24124), Chile (signed 1991, Law 24342), the Belgo-Luxembourg Economic Unit (signed 1990, Law 24123), Germany (signed 1991, Law 24098), France (signed 1991, Law 24100), Spain (signed 1991, Law 24118) and the UK (signed 1990, Law 24184).

Outstanding cases are listed in filing order:
(ARB/Year/sequential case number)

US BIT - 14 cases (claims for USD 2.5 billion)

-- Enron Corporation and Ponderosa Assets, L.P. (Case ARB/01/3)
-- CMS Gas Transmission Company (Case ARB/01/8)
-- LG&E Energy Corp. and LG&E Capital Corp. (Case ARB/02/1)
-- Sempra Energy International (Case ARB/02/16)
-- AES Corporation (Case ARB/02/17)
-- Continental Casualty Company v. Argentine Republic (Case ARB/03/9)
-- Pan American Energy LLC and BP Argentina Exploration Company (Case ARB/03/13)
-- El Paso Energy International Company (Case ARB/03/15)
-- Unisys (Case ARB/03/27)
-- Azurix Corp. (Case ARB/03/30)
-- BP America Production Company and others (Case ARB/04/8)
-- CIT Group Inc. (Case ARB/04/9)
-- Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. (Case ARB/04/16)
-- Asset Recovery Trust S.A. (Case ARB/05/11)

France BIT - 8 cases (claims for USD 5 billion)

-- Compaia de Aguas del Aconquija S.A. and Vivendi Universal (Case ARB/97/3)
-- Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. (Case ARB/03/17) (also under the Spain BIT)
-- Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. (Case ARB/03/18) (also under the Spain BIT)
-- Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (Case ARB/03/19) (also under the

Spain BIT and the UK BIT)
-- Electricidad Argentina S.A. and EDF International S.A.
(Case ARB/03/22)
-- EDF International S.A., SAUR International S.A. and Lon
Participaciones Argentinas -- S.A. (Case ARB/03/23) (also
under the Belgo-Luxembourg BIT)
-- Total S.A. (Case ARB/04/1)
-- SAUR International (Case ARB/04/4)

Spanish BIT) 5 cases (claims for USD 3 billion)

-- Gas Natural SDG, S.A. (Case ARB/03/10)
-- Suez, Sociedad General de Aguas de Barcelona, S.A. and
Interagua Servicios Integrales de Agua, S.A. (Case ARB/03/17)
(also under French BIT)
-- Aguas Cordobesas, S.A., Suez, and Sociedad General de
Aguas de Barcelona, S.A. (Case ARB/03/18) (also under French
BIT)
-- Suez, Sociedad General de Aguas de Barcelona, S.A. and
Vivendi Universal, S.A. (Case ARB/03/19) (also under French
BIT)
-- Telefnica S.A. (Case ARB/03/20)

Chile BIT) 3 cases (claims for USD 1.3 billion)

-- Metalpar S.A. and Buen Aire S.A (Case ARB/03/5)
-- Compa General de Electricidad S.A. and CGE Argentina
S.A. Case ARB/05/2)
-- Enersis and others (Case ARB/03/21)

Belgo-Lux BIT - 3 cases (USD 0.8 billion)

-- Camuzzi International S.A. (Case ARB/03/2)
-- Camuzzi International S.A. (Case ARB/03/7)
-- EDF International S.A., SAUR International S.A. and Leon
Participaciones Argentinas S.A. (Case ARB/03/23) (also under
French BIT)

German BIT - 3 cases (claims for USD 550 million)

-- Siemens A.G. (Case ARB/02/8)
-- Wintershall Aktiengesellschaft (Case ARB/04/14)
-- DaimlerChrysler Services AG v. Argentine Republic (Case
ARB/05/1)

UK BIT) 1 case (claims for USD 1.7 billion)

-- Suez Sociedad General de Aguas de Barcelona, S.A. and
Vivendi Universal, S.A. (Case ARB/03/19)(also under the Spain
BIT and the France BIT)

Netherlands BIT) (1 claim: USD 0.1 billion)

-- TSA Spectrum de Argentina, S.A. (Case ARB/05/5),

Pre-Economic Crisis Argentine ICSID Cases

17. (U) Even before Argentina became a leading defendant in
international arbitration cases as a result of disputes
triggered by the December 2001 economic crisis, the GoA had

been made party to seven ICSID arbitration cases. These cases primarily involved public utility firms who alleged violations of concession contract rights by provincial governments. Four of these seven cases have been concluded. The seven claimants, in order of ICSID case filing dates (ARB/Year/sequential case number) are:

-- Compaa de Aguas del Aconquija S.A. and Vivendi Universal (France, Case ARB/97/3); cancellation of a water/sewage provision contract in the province of Tucuman; case still pending;

-- Lanco International Inc. (US, Case ARB/97/6); port terminals contract in Buenos Aires; proceeding discontinued in 2001 at the request of claimant;

-- Houston Industries Energy Inc. and others (US, Case ARB/98/1); electricity distribution services in the province of Santiago del Estero; award rendered August 24, 2001;

-- Empresa Nacional de Electricidad S.A. (Chile, Case ARB/99/4); enforcement of a stamp tax by the province of Neuquen; proceeding discontinued at the request of claimant;

-- Enron Corp. and Ponderosa Assets L.P. (US, Case ARB/01/3); enforcement of a stamps tax in the provinces of Rio Negro and

Neuquen; case still pending.

-- CMS Gas Transmission Company (US, Case ARB/01/8); GoA's suspension of a clause tying natural gas transportation charges to the US Producer Price Index; ancillary claims added to filing following the 2001 economic crisis; case still pending;

-- Azurix Corp. (Enron Group) (US, Case ARB/01/12); cancellation of a waterworks provision contract in the province of Buenos Aires; award rendered July, 2006.

Post-2001 Crisis ICSID Cases

¶8. (SBU) The vast majority of ICSID arbitrations triggered after 2002 were launched by foreign multinationals that had won public utility concessions during the wave of 1990 Menem-era privatizations in the oil and gas, electricity, water, transportation and telecommunications sectors. These companies claimed breach of concession contracts resulting from the GoA-mandated conversion into domestic currency (&specification8) of public utility rates and the subsequent freezing of such rates. Some claimants also challenged the official ban on foreign exchange remittances abroad (for the most part no longer in force), the mandatory conversion of dollar-denominated bank deposits into Argentine pesos and restrictions on crude oil exports.

¶9. (U) Not all foreign investors negatively affected by the economic turmoil of 2001-2002 and the policy measures that followed chose to file arbitral actions. One major group was foreign-owned commercial banks who were severely impacted by the devaluation, the GoA's subsequent asymmetric conversion into pesos of their dollar-denominated assets and liabilities and the asymmetric indexation of their loan portfolios. Restraint on the part of commercial banks was largely based on GoA promises (subsequently met) to implement measures to compensate their losses. Post-crisis ICSID cases filed for reasons not directly linked to pesification and linked policy measures include: 1) Siemens A.G. claim against the GoA's cancellation of a contract to implement a personal identity and immigration centralized databank; 2) Metalpar S.A. and Buen Aire S.A. claim concerning the production and sale of public transportation vehicles; 3) Continental Casualty Company claim concerning the restraints on transfers; and 4) Unisys Corp. claim concerning a contract to modernize the GoA judiciary's information systems.

Comment

¶10. (C) The GoA's post-crisis pesification of public sector

utility receipts and freezing of tariffs wiped billions off of U.S. investor balance sheets. Some foreign investors have since quit Argentina but many others see considerable opportunity in a market where domestic demand for goods and services is being driven by a 4-year strong economic recovery. Many of these investors appear to have filed ICSID cases primarily to increase their leverage in negotiating new deals with the GoA. The consequent suspension (but not withdrawal) of a significant share of ICSID claims, combined with tribunal awards to date substantially below claimed amounts, indicate that the GoA's probable net ICSID liability is substantially below the \$13-plus billion in total claims.

¶11. (C) But a smaller than threatened ICSID contingent liability for the GoA is hardly the point: The single largest volume of outstanding ICSID cases have been filed against Argentina based on the GoA's unilateral and) in

terms of scale) unprecedented post-crisis breach of public service contracts that were backed by a web of bilateral investment treaties. At a minimum, this regrettable track record will increase the risk premium existing and new foreign investors demand to commit new capital to hard assets and/or long term contracts here. The U.S. investor community in Argentina has repeatedly emphasized to us that, though they continue to add incremental capacity to meet burgeoning demand, they are not/not contemplating substantial new greenfield investment due to the uncertain investment climate here. Argentina's ICSID legacy and the GoA's ongoing predilection for sudden changes in the rules of the regulatory game is costing Argentina its fair share of global investment capital) the share it will need to raise investment rates from the current 21% of GDP to the 25% level needed to sustain medium term GDP growth in the 5-6% range. Argentina's ICSID legacy will remain costly.

WAYNE